Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–55 OF 2001
GOPAL SRI RAM, ZULKEFLI AND ABDULL HAMID EMBONG JJCA
14 AUGUST 2006

Contract — Termination — Distribution agreement — No reason given for termination — Whether entitled to justify termination at trial on sustainable ground

This appeal was directed against the judgment of High Court dismissing the plaintiff's claim for damages for breach of contract. The subject matter of the claim was a distribution agreement entered into between appellant and /respondent. By that agreement, the appellant was appointed as the respondent's distributor of cigarettes manufactured by the respondent. Disputes arose between the appellant and the respondent on the performance of this contract. Following an exchange of correspondence, the respondent by a letter dated 9 March 1992 terminated the agreement in question.

Held, dismissing the appeal:

It is settled law that where a contract breaker gives no reason or a bad reason for terminating a contract, he or she is entitled at the trial to justify the termination on good grounds (see *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339; *Taylor v Oakes, Roncoroni & Co* [1922] 38 TLR 349). Here, although the respondent did not give any reasons in its letter of termination, the respondent was entitled to justify its termination of the distributorship agreement at the trial on a sustainable ground. The respondent was able to demonstrate to a conviction that in several parts of the notes of evidence there were admission of breaches made by the appellant's witnesses under cross examination (see paras 5–6).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap penghakiman Mahkamah Tinggi yang menolak tuntutan plaintif untuk ganti rugi atas kemungkiran kontrak. Perkara pokok tuntutan tersebut adalah satu perjanjian untuk mengedar di antara perayu dan responden. Melalui perjanjian tersebut, perayu dilantik sebagai pengedar rokok responden yang dikeluarkan oleh responden. Pertikaian berbangkit di antara perayu dan responden

A dalam pelaksanaan kontrak tersebut. Selepas surat menyurat, responden melalui satu surat bertarikh 9 Mac 1992 menamatkan perjanjian tersebut.

Diputuskan, menolak rayuan tersebut:

B Ia adalah undang-undang mantap bahawa di mana seseorang yang telah memungkiri kontrak tidak memberi sebarang penjelasan ataupun memberi penjelasan yang kurang baik untuk menamatkan kontrak tersebut, beliau berhak pada perbicaraan menjustifikasikan penamatan tersebut atas alasan yang baik (lihat *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339; *Taylor v Oakes,*
C *Roncoroni & Co* [1922] 38 TLR 349). Di sini walaupun responden tidak memberi sebarang alasan dalam surat penamatannya, ia berhak untuk menjustifikasikan penamatan perjanjian pengedaran di perbicaraan atas alasan yang baik. Responden berjaya menunjukkan sepenuhnya dalam beberapa perenggan nota-nota keterangan bahawa terdapat pengakuan perlanggaran-perlanggaran oleh saksi perayu di bawah
D pemeriksaan balas (lihat perenggan 5–6).]

Notes

For cases on termination of distribution agreement, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4578–4579.

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Cases referred to

Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 Ch D 339 (folld)
Clarke v Edinburgh Tramways (1919) SC 35 (refd)
Panchaud Freres SA v Etablissements General Grain Co [1970] 1 Lloyd's Rep 53 (refd)
F *Taylor v Oakes, Roncoroni & Co* [1922] 38 TLR 349 (folld)

Appeal from: Civil Suit No S4–23–19 of 1993 (High Court, Kuala Lumpur)

G *Ebenezer Ramesh (Azlin Alahakone & Assoc) for the appellant.*
Shanti Mogan (Shearn Delamore) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

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[1] This is the judgment of the court.

[2] This appeal is directed against the judgment of High Court dismissing plaintiff's claim for damages for breach of contract. The subject matter of the claim
I is a distribution agreement entered into between appellant and respondent and dated 1 November 1988. By that agreement, the appellant was appointed as the respondent's distributor of cigarettes manufactured by the respondent. Clause 19 of that agreement, which lies at the heart of the dispute, between the parties reads as follows:

19(a) your distributorship shall be terminated forthwith on the occurrence of the following events:

(i) if you fail to perform or commit a breach of any of the terms and conditions of this agreement or other terms and conditions that may be implemented in the future;

(ii) if disagreement of any nature shall arise between the partners or the board of directors of your company whereby we deem our interest may be imperiled;

(iii) if you or any of your partner shall be incapacitated, die or retire from the partnership;

(iv) if an application is made or threatened to be made, to have you declared a bankrupt or to wind up your company or put under receivership;

(v) if there is any change in the control, management and composition of your partnership or your board of directors, or voting power or shareholding in the partnership of company.

19(b) Not withstanding Clause 19(a) above, your distributorship may be terminated at any time by either party by giving one month's notice in writing to the other without assigning any reason whatsoever therefore and neither party shall have any claim whatsoever against each other in respect of such termination.

[3] Disputes arose between the appellant and the respondent on the performance of this contract. Following an exchange of correspondence, the respondent by a letter dated 9 March 1992 terminated the agreement in question. Basically, the respondent's case in court below and before us is that the appellant acted in breach of contract. At the trial, the respondent drew the attention of the court to several instances which it said constituted breaches of the distributorship agreement. The learned judge after hearing the evidence of both sides held that the appellant had failed to prove its case and that the respondent had justified its termination. She accordingly dismissed the appellant's claim.

[4] In arguing this appeal, learned counsel raised three issues. First, he submitted the learned judge had erred in accepting as admissible, documents in a bundle that were in fact in serious dispute. When we put to counsel whether this formed a ground of appeal, he frankly conceded that it did not. Thereupon, learned counsel for the respondent rose to object to the ground being argued as she was disadvantaged. After considering the objection, we ruled that it was not open to the appellant to argue the point as it had not been pleaded in its memorandum of appeal. This is a question not of mere procedure but of essential justice. The point had not been taken in the court below to afford the learned judge the opportunity to comment upon it. In any event, it would be grossly unfair to counsel for the respondent to have to defend the judgment of the High Court on an unpleaded ground of appeal.

[5] The next point that was taken by the appellant was this. The notice of termination, the appellant says, does not give any reason for terminating the contract. But it is settled law that where a contract breaker gives no reason or gives a bad reason for terminating a contract, he or she is entitled at the trial to justify the termination on good grounds. So, in *Boston Deep Sea Fishing & Ice Co vAnsell* (1888) 39 Ch D 339, a master dismissed a servant on alleged acts of misconduct which they were not

A able to substantiate at the material time. The servant had in fact received a secret commission, a fact which only came to light after the dismissal. The court held that the master could rely on the after-acquired evidence of misconduct and the dismissal was upheld on that ground. So too in *Taylor v Oakes, Roncoroni & Co* [1922] 38 TLR 349, a buyer of goods rejected them for a bad reason. At the trial, the seller's claim B was dismissed because the buyer was able to justify the breach for a good reason. The only exception to this principle lies in the doctrine of estoppel. If a contract breaker has conducted himself or herself towards the innocent party so as to lead the latter to believe that no other ground for termination is being or will be advanced, then the contract breaker will not be permitted by the court to introduce a fresh ground of justification at the trial. See *Panchaud Freres SA v Etablissements General* C *Grain Co* [1970] 1 Lloyd's Rep 53, particularly, the judgments of Lord Denning MR and Winn LJ.

[6] So too here. Although the respondent did not give any reasons in its letter of termination, it was entitled to justify its termination of the distributorship agreement D at the trial on a sustainable ground. Learned counsel for the respondent was able to demonstrate to a conviction that in several parts of the notes of evidence there were admissions of breaches made by the appellant's witnesses under cross examination. Accordingly, we find no merit in this ground of complaint.

E **[7]** Thirdly, it was submitted by learned counsel for the appellant that the learned trial judge did not judicially appraise the evidence that was led before her. It was argued that having regard to the nature and quality of the evidence of the witnesses who testified at the trial, the trial judge ought to have preferred the evidence of appellant's witness to that of respondent's.

F **[8]** It is trite that whether there has been a breach of contract in a given case is a question that turns upon the facts of a particular case. No principle can be drawn from an examination of the decided cases because those cases turn on their individual and peculiar facts. When this court hears an appeal of this nature where findings of fact are made that turn upon the credibility of witnesses, its role is best described by G Lord Shaw of Dunfermline in *Clarke v Edinburgh Tramways* (1919) SC 35, at p 36, where said this:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to H credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, I in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileged of the judge

who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[9] This court has applied these observations on numerous occasions. Applying it once again here, we are satisfied this is not a fit and proper case for us to intervene and disturb the findings of fact made by the judge who had the audio visual advantage at the trial.

[10] For the reasons already given this appeal fails. It is dismissed. The appellant must pay the respondent the costs of this appeal. All orders of the High Court are affirmed. The deposit in court shall be paid out to the respondent to account of taxed costs.

Appeal dismissed.

Reported by Sally Kee